Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network	)	
Information and Other Customer Information	)	

REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully replies to the comments and oppositions regarding CompTel's petition for reconsideration of the *Second Report and Order* in the above-captioned docket.[1]

I. THE RECORD STRONGLY SUPPORTS MUCH OF COMPTEL'S PETITION

The reconsideration petitions and nearly all commenters agreed that the Commission's "flagging" and "electronic audit" safeguards exceed Section 222's purposes.[2] Carriers from every industry segment agreed that these safeguards are complex and extremely costly to implement.[3] Moreover, the additional benefits of these safeguards are miniscule at

---

1 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115 (rel. Feb. 26, 1998) ("*Second Report and Order*").

2 47 C.F.R. §§ 64.2009(a) and (c).

3 *See, e.g.*, SBC Comments at 18-19; Airtouch Comments at 5-6; NCTA Comments at 2-3; and Intermedia Comments at 10-13.

best.[4] Accordingly, CompTel supports the elimination of the requirements that carriers "flag" CPNI on the first screen and implement "electronic audit" systems to track CPNI access. As several commenters noted, the training, supervisory review and corporate certification requirements reasonably promote compliance with the CPNI restrictions.[5]

The record also supports allowing competitive carriers greater use of CPNI to market CPE or information services that are reasonably related to the customer's underlying telecommunications services.[6] Customers consider these services -- such as voicemail, enhanced frame relay services, and message delivery services – to be part and parcel of their telecommunications relationship with the carrier. Therefore, like inside wire services, these services should be considered services "used in" the provision of telecommunications service to the customer. Except in the case of ILECs -- where there is a potential for use of the information to gain an anticompetitive advantage -- the FCC should bring CPE and information services within the total service approach.

II. THE COMMISSION MUST CORRECT ITS ERRONEOUS INTERPRETATION OF SECTION 272'S RESTRICTIONS ON BELL OPERATING COMPANY INFORMATION TRANSFERS

CompTel and other petitioners[7] demonstrated that the Commission's abrupt reversal of its December 1996 *Non-Accounting Safeguards Order* contradicts the plain meaning

---

4 Frontier Comments at 3.

5 Because the remaining Section 64.2009 safeguards protect against misuse of CPNI in a cost-effective way, CompTel opposes the suggestion of some parties that the safeguards be eliminated entirely. *See, e.g.,*, USTA Petition at 11-12. Moreover, CompTel notes that the Commission is considering additional safeguards in the Further Notice stage of this proceeding.

6 *See, e.g.,* AT&T Comments at 10-12; CTIA Petition at 25, 28; Cable & Wireless Comments at 9.

7 MCI Petition at 7-11; Sprint Petition at 6-7.

of the statute and eviscerates an important component of Section 272's separate affiliate safeguards. When a Bell Operating Company ("BOC") transfers CPNI to its interLATA affiliate, it must comply with both Section 222's CPNI rules and Section 272's nondiscrimination requirements. The BOC objections to compliance with these provisions should be rejected.

A. The Plain Language of Section 272 and Structure of the Act Compel the BOCs to Transfer CPNI on a Non-Discriminatory Basis

None of the BOCs refuted CompTel's demonstration (Petition at 2-3) that the term "information" in Section 272 plainly includes CPNI. Section 272(c)(1) explicitly precludes the BOCs from giving their affiliates discriminatory marketplace advantages in any form, whether those advantages are conferred in the provision of goods, services, facilities or (as here) in the sharing of local exchange information. This is precisely the conclusion reached by the FCC in the *Non-Accounting Safeguards Order*, where the Commission "[found] no limitation in the statutory language on the type of information that is subject to the section 272(c)(1) non-discrimination requirement."[8] "Information" as used in Section 272(c) "includes, but is not limited to, CPNI...."[9]

The FCC has consistently been reversed when it attempts to twist or ignore the common meaning of statutory terms to achieve a pre-determined result.[10] The BOCs' tortured

---

8 *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 2297 (1996) ("*Non-Accounting Safeguards Order*").

9 *Id.*

10 *See, e.g., MCI v. AT&T*, 512 U.S. 218 (1994) (power to "modify" the tariff filing requirement does not encompass elimination of tariffing altogether); *AICC v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997) (rejecting narrow reading of "entity").

interpretations of the obligation to provide "information" on a nondiscriminatory basis invite the same outcome. For example, contrary to SBC's claims, Section 272(c)'s use of the broad term "information" simply does not create a "direct conflict" with Section 222.[11] The common reading of the statutory language demonstrates that they are not in conflict at all. Rather, Section 272(c)(1) broadly addresses all types of information. but only when the information flows *from* the BOC *to* the interLATA affiliate.[12] Section 222 regulates a subset of that information, in much broader contexts. The two provisions work in harmony, ensuring that information advantages (of any type) are not given to the interLATA affiliate, while balancing customer privacy and legitimate carrier marketing in all other contexts.

For similar reasons, BellSouth's invocation of the principle that the "specific prevails over the general" is inapposite.[13] First, when addressing the BOCs' relationship with its interLATA affiliate, Section 272 is more specific in the relevant respect. Thus, application of the principle BellSouth advocates would lead to the application of Section 272, not 222, to BOC transfers of CPNI. More fundamentally, BellSouth's argument presumes there is a conflict in the statutory provisions, which as explained above, simply is not true. The FCC is not required to choose *between* Sections 222 and 272, and therefore need not look to canons of construction to identify the applicable statute. Each applies to carefully delineated areas. When those areas overlap – such as in the provision of CPNI from a BOC to an interLATA affiliate – both apply.

---

11 SBC Comments at 12.

12 Section 272 regulates only the BOCs' relationship with its long distance affiliate. CPNI transfers and sharing with other affiliates, such as its mobile services affiliate, are regulated by Section 222 instead.

13 BellSouth Comments at 14.

Similarly, the BOCs' attempts to evade the structure of the Act are equally unavailing. In its Petition, CompTel showed (Petition at 6) that the structure of the Act supports the conclusion that Section 272's obligations are cumulative, applying in addition to the restrictions imposed through Section 222. SBC claims that there is "no comparison" between the alarm monitoring example CompTel cited and Section 272(c)(1) because the alarm monitoring restriction is consistent with the "total service approach" while Section 272(c)(1) allegedly is not.[14] But SBC does not refute the proposition that Section 222 is not the exclusive source of BOC obligations concerning the use of information (including CPNI). If Section 275 applies in addition to Section 222, there is no principled basis on which to conclude that Section 272 does not operate in the same way.

Moreover, CompTel's view of Section 272(c) is fully consistent with the total service approach. A BOC may use local CPNI without authorization in the provision of local service to its customers, and may use CPNI in connection with bundled services, such as a wireline and wireless product. Moreover, the BOCs' local customers retain complete control over whether such information will be disclosed to other parties, including the BOCs' interLATA affiliate.

B. The Requirement that a BOC Not Discriminate in the Transfer of CPNI Does Not Interfere With Joint Marketing Efforts Between the BOC and an Affiliate

Some BOCs claim that Section 272(g)(3) precludes application of Section 272(c)(1) to CPNI.[15] However, Sections 272 and 222 neither preclude joint marketing nor make

---

[14] SBC Comments at 13.

[15] US West Comments at 6; Bell Atlantic Comments at 3.

the sharing of CPNI among these affiliates impractical. Section 272(c)(1)'s non-discrimination obligations address only a BOC's (*i.e.*, the local exchange incumbent's) provision of "information" *to* the interLATA affiliate. This restriction appropriately targets a BOC's legacy advantage as a monopoly provider to prevent the new interLATA affiliate from profiting on an advantage denied other interLATA carriers. The BOC affiliate must collect information on its own – just like any competitive entity must – or share with competitors information it receives from the BOC. It prevents, for example, the BOC giving its interLATA affiliate a discriminatory advantage in *targeting* potential customers for its interLATA services

The section 272 affiliate, by contrast, faces essentially no limitations regarding what services, facilities, and information that it may provide to its BOC parent.[16] Thus, a section 272 affiliate may provide CPNI it obtains from its customers *to* the BOC parent so long as the affiliate has otherwise complied with the Commission's CPNI waiver requirements. For example, if an interLATA affiliate provides service to a customer, the affiliate is free under both Sections 222 and 272(c)(1) to provide interLATA CPNI to the BOC, which may, in turn, use the information in conjunction with local service CPNI to market new service packages to this customer. In this scenario, none of the alleged difficulties raised by the BOCs and the *Second Report and Order* come into play.[17]

By allowing section 272 affiliates to provide information to their BOC parents, but not receive information *from* them except on a nondiscriminatory basis, Congress promoted the customer convenience and control aspects of Section 222 and prevented affiliates from

---

16 Section 272(g)(2) prevents a BOC from marketing its long distance affiliate's service within a BOC's in-region states until the BOC receives authorization to provide in-region interLATA service within a state under section 271(d). *See* 47 U.S.C. § 272(g)(2).

17 Also, a BOC is free to engage in a wide range of joint marketing arrangements with its affiliate that do not rely on the use of CPNI.

obtaining an unfair information advantage over other interLATA carriers. The goal of Section 272 is to place interLATA affiliates in the same shoes as competitive entities. Like unaffiliated carriers, they may not use BOC local service CPNI to target potential customers, except upon affirmative written consent from the customer. But, once the affiliate serves a customer, it may provide CPNI to the BOC to enable the combined entity to offer convenient packages of these services. In other words, section 272(c)(1) in no way limits the convenience of customers' service, rather it limits only the information advantage that certain BOC affiliates would otherwise receive by virtue of being associated with a BOC. Instead they must operate with the same advantages and disadvantages of independent IXCs. There is nothing "nonsensical" about such a requirement.

III. CPNI PROTECTION SHOULD BE TAILORED TO REFLECT THE DIFFERENT COMPETITIVE IMPLICATIONS OF CPNI USE AMONG CARRIERS

Arguing against a straw man, several BOCs complain that CompTel advocates "carving up" Section 222 and interpreting Section 222 differently depending upon the type of carrier using CPNI.[18] These arguments misconstrue CompTel's petition. CompTel agrees that the CPNI standard employed in Section 222 applies to "every telecommunications carrier." Thus, those limitations on CPNI use mandated by Section 222 apply across the board to all carriers.

Where CompTel differs with these commenters, however, is that CompTel does not accept the premise that Section 222's obligations are exclusive or that they represent the ceiling on the FCC's ability to regulate to protect against the anticompetitive use of customer

---

[18] BellSouth Comments at 14; Bell Atlantic Comments at 3; Ameritech Comments at 7.

information. Where competitive considerations differ – as they do in the case of the largest incumbents' access to CPNI – tailoring of the rules is necessary and appropriate.

This can be accomplished one of two ways. First, as CompTel argues in the Petition, the Commission always has possessed the power to regulate customer information (including CPNI) outside of Section 222. Thus, the Commission is free to add requirements necessary to address concerns unique to one class of carriers or unique to a particular context. This is essentially what the Commission had always done in the case of the BOCs, GTE and AT&T. Alternatively, the FCC can forbear from applying portions of Section 222 where the criteria for forbearance are met. Several petitioners suggested this approach,[19] and a number of commenters, including U S West acknowledge that the FCC has this option.[20] The Commission already has on several occasions used forbearance selectively, targeting relaxed regulation to non-dominant carriers.[21] Using one of these means, CompTel urges the Commission to adopt the additional safeguards described in its petition.[22]

IV. CPNI AUTHORIZATIONS OBTAINED PURSUANT TO THE COMPUTER III RULES NO LONGER ARE EFFECTIVE

Among the BOCs, only Ameritech responded to CompTel's arguments concerning approvals obtained under the *Computer III* regulatory scheme. Ameritech failed to show, however, that the *Computer III* approval process satisfies the informed consent standard embodied in the Commission's CPNI rules. In fact, its response essentially admits that consent

---

19 *See, e.g.,* CTIA Petition at 34; GTE Petition at 2-6.

20 U S West Comments at 18 n.41.

21 *See, e.g., Hyperion Telecommunications, Inc.*, 12 FCC Rcd 8596 (1997) (granting forbearance to nondominant LECs).

22 CompTel Petition at 12-13.

was solicited in a high-pressure environment that would violate the CPNI rules adopted by the Commission. Lacking the central premise of the new rules, approvals received in the *Computer III* environment do not translate to the Section 222 environment.

Though Ameritech acknowledges that the BOCs frequently threatened customers with negative consequences if they withheld approval, it argues without support that this "did not amount to . . . improper pressure to grant consent."[23] However, the new rules clearly prohibit the Hobson's choice many BOCs forced customers to make.[24] And with good reason. Many customers under the *Computer III* regime may have granted consent solely in order to retain their existing customer support team. If approval were requested in the manner prescribed by Section 222, these customers would not have had to face that choice and could have freely exercised their rights to control CPNI.

In addition, Ameritech does not refute CompTel's showing that the context under which approval was solicited was different in other respects as well. Not only are competitive market conditions radically changed such that the customer has new reasons to grant or deny CPNI access to the BOC, but the BOCs' *Computer III* solicitations were made without the many safeguards contained in the new rules. *Computer III* solicitations did not require a full disclosure of the customer's CPNI rights (rights which were, in any event, different than a customer's rights under Section 222), a statement that federal law imposed a duty to protect the confidentiality of this information, or that the solicitation be proximate to the notification that was provided. Without these significant safeguards, there is no assurance that waivers obtained were fully

---

23 Ameritech Comments at 13.

24 *See* 47 C.F.R. § 64.2007(f)(2)(iii).

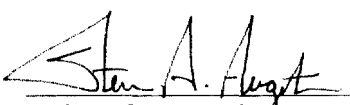
informed. Accordingly, the Commission should not allow the BOCs to rely on stale *Computer III* approvals in the new environment of Section 222.

V. CONCLUSION

For the foregoing reasons, CompTel submits that the Commission should reconsider its rules issued in the *Second Report and Order* and make modifications consistent with the proposals outlined in CompTel's petition for reconsideration.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

Robert J. Aamoth
Steven A. Augustino
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

Genevieve Morelli
Executive Vice President
and General Counsel
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

July 6, 1998